



COMMONWEALTH OF VIRGINIA
Department of Education
Division of Special Education and Student Services
Office of Dispute Resolution & Administrative Services

BRIEFING

TO: Virginia Council on the Interstate Compact on Educational Opportunity for Military Children

FR: Judy Douglas
Director, Dispute Resolution & Administrative Services

DATE: May 3, 2012

TOPIC: **CHILDREN WITH DISABILITIES WHO TRANSFER –
SPECIAL EDUCATION PROTECTIONS**

Most Common Complaints

- Children transferring to new school division and not receiving comparable services consistent with their incoming IEPs. (Individualized Education Program – IEP)
- School personnel claiming that there are insufficient resources to meet the provisions of the incoming IEP.
- IEP teams delay writing IEPs in order to conduct evaluations.
- Incoming student's IEP expires during transfer; therefore, school division will not implement IEP, delay in writing IEP in order to conduct evaluations.
- School personnel not providing parents with procedural safeguards information.

What Does the Law Say Regarding Transfer Students
34 Code of Federal Regulations §300.323(e)(f) and (g); corresponding Virginia Regulations at 8 VAC 20-81-120

- A. The receiving LEA (local educational agency/local school division) must provide a free appropriate public education (FAPE)
- ❖ in consultation with the parents,
 - ❖ including comparable services to those described in the student's incoming IEP until the receiving LEA:
 - ✓ adopts and implements the student's incoming IEP with parental consent; OR

- ✓ evaluates the student, and develops and implements a new IEP with parental consent.
 - The receiving LEA may develop and implement an interim IEP with parental consent while obtaining and reviewing any new information.

Note: If the receiving LEA is unable to obtain an IEP from the previous LEA or the parent, the receiving LEA is not required to provide special education and related services to the child. The receiving LEA places the child in a general education program and evaluates the child if the LEA determines that an evaluation is necessary.

- ❖ During the evaluation process, the LEA must provide the child services in accordance with the existing IEP and the IEP team’s determination of comparable services.
- ❖ The LEA must exclude any section of the IEP that is not in accordance with the federal and state regulations governing special education.

B. Who “Consults” with the Parents; What Does “Consultation” Mean

- ❖ The responsibility for consultation with the responsibility of determining comparable services rests with the IEP team. The U.S. Department of Education’s Office of Special Education Programs (OSEP) clearly directed this mandate in its Commentary and Analysis of the federal regulations governing special education. (Federal Register, 2006, p. 46681).
- ❖ The school division must ensure that the parent is provided the opportunity to provide input on the child’s educational needs, as well as for the school division to provide information to the parent about the division.
- ❖ Parental consent is not required.

[VDOE, Frequently Asked Questions (FAQ) #007-10; see attached]

C. What Does “Comparable Services” Mean

From OSEP:

We do not believe it is necessary to define “comparable services” in these regulations because the Department [U.S. ED] interprets “comparable” to have the plain meaning of the word, which is “similar” or “equivalent.” Therefore, when used with respect to a child who transfers to a new public agency from a previous public agency in the same State (or from another State), “comparable” means services that are “similar” or “equivalent” to those that were described in the child’s IEP from the previous public agency, as determined by the child’s newly designated IEP Team in the new public agency.

[Federal Register, 2006, p. 46681]

- ❖ In protecting the child’s entitlement to FAPE, services may not be interrupted.

- An LEA may not request the transfer child to remain at home without receiving special education and related services until the receiving LEA develops an IEP, even if the receiving IEP has expired.

[OSEP Q&A, June 1, 2010, “IEPs, Evaluations and Reevaluations,” #A.1 and A.3]

- An LEA must initiate steps to process the transfer child “within a reasonable period of time” to avoid undue interruption in the provision of required special education and related services.

[OSEP Q&A, *Id.*, #A.4]

- ❖ School divisions may organize and implement their approaches to services in ways that meet the child’s needs differently, although as effectively.
- ❖ The decision as to what is “comparable services” rests with the IEP team of which the parent is a member.
- ❖ Parental consent is not required.
- ❖ LEAs may not preclude/deny/delay services based on administrative reasons (i.e., insufficient funds, personnel, other resources.)

Note: If the LEA determines an evaluation is needed and the parent refuses consent, the LEA may: (1) initiate its dispute resolution options of mediation and due process to override the parent’s refusal, or (2) agree not to evaluate the child. In both cases, the LEA treats the student as a general education student. The LEA may also agree with the parent not to evaluate and adopt the incoming IEP. [OSEP Q&A, *Id.*, #A.5]

D. What Recourses Are Available to Parents in a Dispute

- ❖ Dispute resolution options: mediation, complaints, due process
http://www.doe.virginia.gov/special_ed/resolving_disputes/

Contact Information:

Office of Dispute Resolution and Administrative Services

General phone number: 804-225-2013

Voice/Relay: 1-800-292-3820. Text users dial 711 for Relay Services

Mailing address: P. O. Box 2120, Richmond, VA 23218-2120

Fax number: 804-786-8520

Web site for directory for ODRAS Staff:

http://doe.virginiainteractive.org/vdoe_directories/StaffByDivisions.aspx?o=Dispute%20Resolution%26Administrative%20Services&w=true

FREQUENTLY ASKED QUESTIONS

007-10 STUDENTS WHO TRANSFER

The Regulations Governing Special Education Programs for Children with Disabilities in Virginia, at 8 VAC 20-81-120 A.2, indicate that for transfer students, the new LEA shall provide a free appropriate public education (FAPE) "...in consultation with the parent(s)..." until the LEA either adopts the IEP from the previous LEA or conducts an evaluation and develops and implements a new IEP.

- What does "in consultation with the parent(s)" mean?
- How must the "consultation" be documented?
- Who is responsible for this consultation process?

This regulation also directs the new LEA to provide FAPE "including services comparable to those described in the child's IEP from the previous" school division.

- What does "comparable services" mean?
- Who determines "comparable services"?
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The provisions of 8 VAC 20-81-120 A.2 ensure that children with disabilities who transfer from school divisions located in Virginia or elsewhere are provided FAPE while the new school division works to secure information from the previous school division. These requirements protect the child's FAPE entitlement by ensuring that the right to services is not interrupted. The requirements also take into consideration the fact that school divisions may organize and implement their approaches to services in ways that meet children's needs differently, although as effectively, and that other states may have requirements that differ in some respects from those in Virginia.

Virginia's regulation noted above mirrors the federal regulation at 34 CFR § 300.323 (e) and (f). The LEA must consult with the parent(s) and determine comparable services. The language in this provision does not specifically direct who is responsible for the "consultation" with the parent(s) and the determination of "comparable services". In the context of addressing the meaning of "comparable services", however, the U.S. Department of Education's Office of Special Education Programs (OSEP) places this responsibility squarely with the IEP team. OSEP states in its commentary on the IDEA regulations:

We do not believe it is necessary to define "comparable services" in these regulations because the Department [U.S. DOE] interprets "comparable" to have the plain meaning of the word, which is "similar" or "equivalent." Therefore, when used with respect to a child who transfers to a new public agency from a previous public agency in the same State (or from another State), "comparable" means services that are "similar" or "equivalent" to

those that were described in the child's IEP from the previous public agency, **as determined by the child's newly designated IEP Team in the new public agency.** [emphasis added]
[Federal Register, 2006, p. 46681]

The language in the regulation joins the responsibility for the consultation with the responsibility of determining comparable services. These responsibilities are not separate and distinct. For this reason and since OSEP clearly directs the IEP team to determine comparable services, the IEP team is responsible also for the consultation process.

"In consultation with the parent(s)" means ensuring that the parent is provided the opportunity to provide input on the child's educational needs, as well as for the school division to provide information to the parent about the division.

The regulations do not require specific documentation of the consultation process or determination of comparable services; thus, giving school divisions some flexibility to develop their own mechanisms for ensuring compliance with the requirement. For example, a school division might document the process on a form that specifies basic data information, summary of the discussions and determinations, including what services will be provided, and the signature of persons present, including the parent. The requirements for Prior Written Notice will also document the IEP team's determinations. It is important to note, however, that the regulations do not require parental consent for the school division to initiate services comparable to those in the child's current IEP. Parental consent follows the IEP team's determination to adopt the child's IEP from the previous LEA, or pursuant to the team's development of an interim or new IEP.

Important

Remember that both federal and state regulations governing special education provide flexibility to school divisions to amend a child's IEP without a meeting. (8 VAC 20-81-110 B.9). Recognizing that it may take some time to convene an IEP meeting at a mutually agreed upon time and place, the school division and parent may agree not to convene an IEP meeting for this purpose. Recall that in this instance the school division must ensure that the child's IEP team is informed about the comparable services to be provided the child until the LEA either adopts the IEP from the previous school division or conducts an evaluation and develops and implements a new IEP.

Practice Tip

Please note that the IEP team's decision may be challenged by a parent in a state complaint or a due process hearing. As a result, it is advisable for the IEP team to carefully document its reasoning with regard to the comparability of services, especially in cases where the services in the previous IEP are not being identically replicated.